bsb

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 582 OF 1997

Mr. Abhimanyu Dattaram Sawant & ors. ... Petitioners

V/s

Rauko Cine Laboratories & ors. ... Respondents

Mr. K.S. Bapat for the petitioners.

Mr. C.U.Singh i/by Mr.Sanjay Udeshi for respondent Nos.1 and 2.

Respondent No.2 is a formal party.

CORAM: SMT. NISHITA MHATRE, J.

DATED: 19TH DECEMBER, 2007.

ORAL JUDGMENT:

1. This petition impugns the judgment and order of the Industrial Court dated 4.7.1996 in Complaint (ULP) Nos. 1450 to 1458 of 1992, 1460 to 1463 of 1992 and 797 of 1993. The 14 petitioners in these petitions had filed individual complaints under Items 5, 7, 9 and 10 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. The complaints have been dismissed by the Industrial Court on 4.7.1996.

2. The facts giving rise to the present petition are as follows:

. The petitioners were permanent workmen of respondent Nos.1 and 2 (hereinafter referred to as "the Company" in short). They were members of the Bharatiya Kamgar Sena (hereinafter referred to as "the Union" in short). According to the petitioners, they continued to be members of the Union upto 31.12.1991. On 24.1.1992 a notice was displayed by the Company declaring a purported closure. This, according to the petitioners, was a sham and bogus closure. Closure compensation was not paid to the workmen nor were their services terminated pursuant to the closure, in accordance with law. The union filed a complaint against the Company contending that the alleged closure was in fact an illegal lock-out. A declaration was sought under Items 6 of Schedule II of the M.R.T.U. & P.U.L.P. Act in that complaint. On 21.7.1992 a settlement was entered into between the union and the Company. The complaint was withdrawn in view of that settlement. The petitioners contend that thereafter the Company employed new hands in its factory and recommenced operations from 16.8.1992. The petitioners approached the Company for work when they learnt that the factory was restarted. However, they were not reinstated in service nor given

re-employment by the Company. The petitioners by letter dated 12.10.1992 called upon the Company to reinstate them in service with continuity and full back wages. As their demand was not acceded by the Company, the petitioners filed complaints before the Industrial Court under Items 5, 7, 9 and 10 of Schedule IV of the M.R.T.U. & P.U.L.P. Act. The petitioners contended that they had worked in the Company upto 23.1.1992. However, from 24.1.1992 they were not permitted to enter the premises of the Company. Their services had not been terminated and, therefore, they continued in service. The petitioners contended that the failure of the Company to pay them wages each month amounted to an unfair labour practice. The petitioners also pleaded that the Company had violated the provisions of Section 25H on and from 16.8.1992. Interim relief was also sought by the petitioners. The Industrial Court directed the Company to pay the petitioners their legal dues which they were entitled to on closure of the establishment. Being aggrieved by that order, the Company preferred Writ Petition No.2309 of 1993 which was rejected by this Court on 26.11.1993.

3. The petitioners were permitted to amend their complaints by the Industrial Court by its order dated 26.3.1993. These amendments were to the effect that the

Company had breached the mandatory provisions of Section 24 of the M.R.T.U. & P.U.L.P. Act by effecting an illegal lock-out from 24.1.1992. The petitioners contended that this amounted to unfair labour practices under Item 6 of Schedule II and 9 of Schedule IV of the Act. The petitioners then contended that, although the lock-out had been lifted by the Company, they were not permitted to work and had instead been illegally terminated from service. By a purshis dated 30.9.1994 the petitioners confined the reliefs claimed in the complaint to the cause of action which arose w.e.f. 16.8.1992. The petitioners categorically stated that they did not want to claim any relief which the union had prayed for in Complaint (ULP) No.228 of 1992. The petitioners also stated that they did not wish to insist upon any of the amendments sought for other than the amendment to para 3(F) and prayer clause 9(c-i).

4. All the complaints filed by the petitioners were heard together and common evidence was led in the complaints. Several documents were placed on record by both, the petitioners and the Company. Oral evidence was also led by the petitioners by examining two witnesses on behalf of the petitioners. Significantly, the Company did not lead any oral evidence inspite of the purshis filed by the petitioners stating that they

did not admit the documents filed by the Company.

5. By judgment and order dated 4.7.1996, the Industrial Court dismissed the complaints filed by the petitioners. The Industrial Court held that the relief claimed in the complaint was similar to the relief claimed by the union which had withdrawn Complaint (ULP) No.228 of 1992 filed by it. The Industrial Court further held that the contention of the petitioners that they were entitled to re-employment in view of the provisions of Section 25H of the Industrial Disputes Act was unsustainable as they were not retrenched workmen but their services had ceased on account of closure of the establishment.

6. The learned advocate for the petitioners submits that the Company has not been closed as no notice of closure was given and the closure has not been proved by the Company. He submits that the settlement purported to have been signed under Section 2(p) by the Company with the Union has not been proved and, therefore, there is no evidence on record to prove the closure. He further submits that a Union cannot enter into an agreement with an employer to terminate the services of workmen in breach of the provisions of law. The learned advocate then submits that in any event the settlement signed by the Union with the Company is not binding on

the petitioners as they were not members of the Union. The petitioners had resigned from the union on 31.12.1992 points out the learned advocate and, therefore, a settlement allegedly signed under Section 2(p) read with Section 18(1) of the Industrial Disputes Act was not binding on them. The learned advocate then submits that, although the membership register of the Union was produced in Court, it was not proved by the Company in order to establish that the petitioners were members of that Union. The learned advocate points out that only a photocopy of the alleged settlement signed between the Company and the Union on 21.8.1992 was placed on record and not the original. He also draws my attention to the fact that this settlement was not filed in Complaint (ULP) No.228 of 1992 when that complaint was disposed of as settled. He, therefore, submits that the settlement on which the Company relies has neither been filed nor proved in either Complaint (ULP) No. 228 of 1992 or in the complaints in which the impugned order was passed. The learned advocate urges that the complaints filed by the petitioners are maintainable and the Industrial Court has committed an error apparent on the face of the record in dismissing the complaint on the ground that an earlier complaint had been filed by the Union for the same reliefs which was later withdrawn by it. Lastly, the learned advocate submits that the

services of the petitioners have not been terminated in accordance with law but by a settlement which is not binding on them and this is another circumstance which indicates there was no closure but an illegal lock-out.

7. The learned counsel for the Company submits that the complaints filed by the petitioners were not maintainable as they were filed for the same cause of action, namely, illegal closure of the Company. He submits that, since the union representing the petitioners had withdrawn that complaint, the petitioner had no *locus standi* to file the present complaints. He draws my attention to Order 23 Rule 1 of Civil Procedure Code and submits by relying on the judgment of the Apex Court in the case of **Maharashtra Kamgar Snagharsha Samiti & anr. v/s Horizon, the Beach Hotel & ors., reported in 2006 I C.L.R. 419** that, as a matter of public policy, the petitioners ought not to be permitted to urge the contentions raised in the complaints once their union had withdrawn an identical complaint. The learned counsel then points out that the petitioners have in their complaints pleaded that they were members of the Union and, therefore, there was no necessity for proving their membership. According to the learned counsel, the petitioners had confined their complaint to only those reliefs which were not sought by the Union in

Complaint (ULP) No.228 of 1992. He submits that, by purshis dated 30.9.1994 the petitioners have relinquished the relief claimed in the complaint and confined their claim to the pleadings in para 3(F) and prayer 9(c-i) which were inserted in the complaint by amendment. These pleadings were to the effect that the Company effected an illegal lock-out and had denied work to the petitioners although the lock-out had been lifted. The pleadings in para 3(F) also indicate that, after the lock-out was lifted, the Company had recruited new hands in place of the petitioners. The learned counsel then submits that, considering the pleadings in the complaint, the cause of action has arisen on 16.8.1992 on which date the Company restarted its functioning. He submits that petitioners are not entitled to any relief under Section 25H as their services came to an end, not on account of retrenchment, but because of closure of the establishment and, therefore, they were not entitled to re-employment. The learned counsel points out that the factum of closure was accepted by the workmen. He submits that, in the original complaint, it was pleaded that the cause of action arose on 24.1.1992 and thus the complaint was hopelessly delayed. The learned counsel submits that, even if it is accepted that the cause of action has arisen on 16.8.1992, on which date the Company had

re-opened its operations, there was a delay in filing the complaint. The learned counsel draws my attention to the fact that the legal dues payable on account of closure have already been paid to the workmen pursuant to the orders of the Industrial Court.

8. Before discussing the main issues which arise for my consideration it would be necessary to deal with the submission of the learned counsel for the Company that the complaints ought to be dismissed as they have been filed beyond the period of 90 days since the cause of action arose. Although this contention has been raised by the Company in its written statements, the Industrial Court has not framed an issue in this regard, nor has it been discussed in the impugned order. This contention has been raised before me by the learned counsel without there being any affidavit indicating the company's exception to the order of the Industrial Court. In my opinion, the Company can be permitted to raise this contention only if it had challenged the order to that limited extent either by filing a civil application or at least by raising the objections in an affidavit. The Company therefore in the facts and circumstances of this case cannot be permitted to raise the issue before this Court. Apart from this, the workmen have rightly contended that there is a continuing cause of action

since they have not been assigned work after 24.1.1992 and in any case after 16.8.1992.

9. While considering the submissions advanced at the bar it is necessary to bear in mind that, although evidence of A.D.Sawant, petitioner No.1 and B.B.Patil, petitioner No.2 was led on behalf of all the petitioners, the respondent Company has not cared to lead any evidence. Documents produced by the Company including a photocopy of the settlement dated 21.7.1992, have not been admitted by the petitioners and they have filed a purshis indicating so.

10. The first question which arises is, whether in fact the settlement dated 21.7.1992 was proved before the Industrial Court for it to be relied on for rejecting the claim of the petitioners. The Industrial Court has while accepting the settlement lost sight of the fact that the photocopy which was produced before it in the present complaints, had not been admitted by the petitioners. Surprisingly, the Industrial Court has ignored the fact that this settlement had not been proved by the Company by recording evidence of one of its officers or of an office bearer of the Union. Therefore, in my view, the reliance placed by the Industrial Court on this settlement is without any basis

as it has not been proved in accordance with law.

11. The next question is whether, assuming the settlement had been proved, it was binding on the petitioners. The petitioners in their complaints, have stated that they were members of the Union. In the affidavit filed by the 1st petitioner, it is stated that the petitioners had resigned from the membership of the Union and, therefore, were not bound by any settlement signed by it with the Company. The affiant has categorically stated that, neither the Union nor the Company informed the workmen that a settlement was signed under which the Union agreed to accept the closure effected by the Company. In his cross-examination, he has admitted that the membership subscription of the Union was collected by the committee members of the Union employed in the Company and that it was collected for the whole year. He has also admitted that he was one of the committee members of the Union and that he had collected the membership subscription from the workmen and deposited it with the Union on 24.1.1992. He has stated that no receipt was furnished to him. However, the witness has stated that this amount which was deposited was towards the arrears of membership subscription recovered from the workmen. Similarly, petitioner No.2 who was examined as the other

witness in support of the complaints, has stated in his cross-examination that the workmen of the Company became members of the Union between 1987 and 1988. A Committee of five workmen including himself and the first petitioner and other workmen collected membership fees from the other workmen and deposited the amount with the Union Thus, both these petitioners have admitted that all the workmen were members of the Union and continued to be its members upto 31.12.1991. There is nothing on record to indicate that the membership subscription which was deposited with the union on 24.1.1992 was paid as the subscription for the whole year of 1992. No receipts have been produced by the respondent Company to indicate that the workmen were in fact members of the Union during this period. The Industrial Court has ignored the fact that the original receipts in respect of payment of membership subscription were not produced before the Court, either in Complaint (ULP) No.228 of 1992 or in the present complaint. In this view of the matter, it cannot be said that the petitioners were members of the Union when it signed the settlement with the Company on 21.7.1992 and, therefore, the settlement is not binding on them. Apart from this, Clause 3 of the settlement stipulates that only those workmen who accepted each term of the settlement and signed a receipt in the format annexed to the settlement would be

entitled to benefits under the settlement. Admittedly, none of the petitioners had indicated their acceptance of the terms of the settlement nor had they signed any receipt. Therefore, the settlement was not binding on the petitioners.

12. It is true that, public policy demands that when a Union files a complaint or any proceeding in Court on behalf of its members and withdraws the same for one reason or the other, the workmen would normally not be permitted to agitate the same issue in a fresh complaint. However, in the present case, there is no evidence to indicate that the workmen were members of the Union after 31.12.1991. The Company has not proved the settlement dated 21.7.1992 allegedly arrived at between it and the Union. The Company has also not proved that this settlement was binding on the workmen nor is there any evidence to indicate that the settlement dated 21.7.1992 was produced and proved in either Complaint (ULP) No. 228 of 1992 or in the present complaint. It is, therefore, difficult to comprehend as to how the Industrial Court could have relied on this settlement when it was not proved before it.

13. The Company has not relied on any other evidence

except the photocopy of the agreement of 21.7.1992 to establish its case that there was a valid closure of the undertaking on 24.1.1992. The Industrial Court has accepted this document and held that there was a closure which cannot be questioned by individual workmen in view of the settlement. I have already held that the agreement has not been proved and, therefore, the Industrial Court has erred in relying on it. There is no evidence on record to prove that the requirements of Rule 62 of the Industrial Disputes (Bombay) Rules, 1957 have been fulfilled. The agreement is signed by the Union and the Company. Individual workmen have not signed the agreement. It has allegedly been signed under Section 2(p) read with Section 18(1) of the Industrial Disputes Act. This provision stipulates that a settlement arrived at between the employer and the workmen is binding only on the parties to the agreement, if it is not signed during the course of conciliation proceedings. The agreement of 21.7.1992 is not arrived at during the course of conciliation proceedings and it has not been signed by the workmen concerned i.e. the petitioners herein. I have already held that the Company had failed to prove that the petitioners were members of the Union when it arrived at the settlement. Hence, the entire edifice of the Company’s case, that there was a closure of the establishment which was

accepted by the workmen, crumbles.

14. Even if one accepts the argument on behalf of the Company that the agreement had been proved and was binding on the petitioners, the Union had no right to agree to accept the termination of the workmen's services from 24.1.1992. A bare perusal of Section 18(1) indicates that even a recognised union cannot sign such an agreement relating to dismissal, discharge, removal, retrenchment or termination of service or suspension of an employee. Therefore, in my opinion, the Union, which was admittedly not a recognised Union, had no right to decide the fate of individual workmen by accepting the closure of the establishment which led to the termination of service of the individual workmen. In the case of **Oswal Agro Furane Ltd. & anr. v/s Oswal Agro Furane Workers Union & ors., reported in 2005 I C.L.R. 816,** the Supreme Court considered whether a settlement signed under Section 2(p) read with Section 18(3) of the Industrial Disputes Act between the Union and the employer could be arrived at in breach of the provisions of Sections 25-N and 25-O. While dealing with this issue, the Supreme Court has observed that a settlement regarding retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. The Court

observed that the provisions being imperative in character would prevail over the right of parties to arrive at a settlement. The settlement has to be in conformity with the statutory provisions laying down a public policy. It was held that a contract which may otherwise be valid must satisfy the test of being in consonance with public policy, not only in terms of the provisions of which a breach is complained of but also in terms of Section 23 of the Indian Contract Act. In the present case, the Union has signed away the rights of individual workmen by agreeing to the termination of services pursuant to a sham closure. The right of the workmen to continue in employment is protected both by statutory provisions of law as well as the rules of natural justice. The employer and the Union cannot breach these provisions and decide that the workmen's services stand terminated pursuant to a sham closure. Therefore, considering the issue from this angle as well, the settlement is not binding on the petitioners.

15. The closure has not been proved. Therefore, the Company had no right to refuse work to the petitioners after 24.1.1992 on account of the so called closure. The Union was not authorised to file Complaint (ULP) No.228 of 1992, nor was it empowered to withdraw it, once filed. The speed and alacrity with which the

Company and the Union have acted, after Complaint (ULP) No.228 of 1992 was filed to ensure the withdrawal of the complaint, leaves no room for doubt that they had not acted bonafide. The Industrial Court, while accepting the agreement, surprisingly failed to recognise this fact. The Industrial Court has dismissed the complaints of the petitioners mainly on the ground that allegations contained in the complaints had been raised in Complaint (ULP) No.228 of 1992 which had been withdrawn as settled and that the agreement was binding on the petitioners.

16. The Company has not assigned any work to the Petitioners after 24.1.1992 when it stopped its operations. Nor has it assigned work after restarting the operations within 8 months. As I have held there was no closure the workmen ought to have been provided with work from 24.1.1992 onwards and paid wages accordingly. In any event, by not assigning work to the petitioners from 16.8.1992 the company has committed an unfair labour practice under Item 9 since the services of the workmen had not been terminated at any point of time. In these circumstances the provisions of section 25H are not applicable as there is no termination of service either by way of retrenchment or otherwise. However, the petitioners would have to prove that they remained unemployed from 24.1.1992 till today. The

complaints would therefore have to be remanded to the Industrial Court to decide the following issues :-

(i) Whether the complainants have remained unemployed from 24.1.1992 upto today ?

(ii) Whether they are entitled to full wages and consequential benefits during the aforesaid period ?

If the answer to the first issue is in the affirmative, the workmen would be entitled to work with the Company with continuity of service from 24.1.1992. The workmen have been paid closure compensation pursuant to orders of the Court. This amount shall be adjusted against the arrears of wages and other consequential benefits payable to each petitioner.

17. The impugned judgment and order is, therefore, set aside. The complaints are remanded to the Industrial Court for a decision on the aforesaid issues. Parties may lead additional evidence, if they so desire. The Industrial Court shall dispose of the complaints by June 30, 2008.

18. Rule made absolute with costs quantified at

Rs.1000/- per petitioner.

.....